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In The

Supreme Court of the United States

October Term, 1978

No. 78-614

CONSTRUCTION & GENERAL LABORERS' UNION, LOCAL 1140, affiliated with International Laborers' Union of North America, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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CONSTRUCTION & GENERAL LABORERS' UNION, LOCAL 1140, affiliated with International Laborers' Union of North America, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

———o———

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit which affirmed and adopted the Master's findings of fact and conclusions of law and found Petitioner in civil contempt of the Court.

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OPINIONS BELOW

The decision and judgment of the United States Court of Appeals, Eighth Circuit, is set forth in Appendix A hereto. The report of the Special Master is set forth in Appendix B hereto. The judgment on contempt is set forth in Appendix C hereto and is reported at 577 F. 2d 16. The decision of the United States Court of Appeals, Eighth Circuit, denying Petitioner's request for a rehearing and a rehearing en banc is set forth in Appendix D hereto. An order of the United States Supreme Court extending time to file a writ of certiorari is set forth in Appendix E hereto.

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JURISDICTION

The judgment of the Circuit Court of Appeals, Eighth Circuit, was entered on May 8, 1978 and the denial by the Court of Appeals of a petition for rehearing en banc and rehearing was made on June 14, 1978. On August 26, 1978 Petitioner filed an application for extension of time in which to file a Petition for Writ of Certiorari and on August 31, 1978 an order was issued by Honorable Harry A. Blackmun, Associate Justice of the Supreme Court of the United States extending time to file the petition until October 11, 1978.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1) and in accordance with Supreme Court Rule 19.

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QUESTIONS PRESENTED

1. Is a union trustee of an employee benefit fund, established and authorized by Section 302 (c) (5) of the Labor Management Relations Act, 29 U. S. C. 186 (c) (5), as amended, an agent of the union for the purposes of Section 8 (b) of the National Labor Relations Act, as amended?

2. Is an employee benefit trust a separate entity from the labor organization which took part in establishing it?

3. Can a union trustee of an employee benefit trust be an agent of the union when the Employee Retirement Income Security Act of 1974, 29 U. S. C. § 1001 *et seq.* imposes on such a trust the duty, *inter alia,* to act solely in the interests of the plan's participants and beneficiaries?

4. Even though the trust fund involved herein resulted from bargaining between employers and the union, are the trustee's duties fiduciary in nature? Did the union trustee herein perform separate functions on behalf of the trust and, consequently, did not act as a representative of the union?

5. Can the National Labor Relations Board assert contemptuous conduct against the union in this case when it decided *Sheet Metal Workers International Association and Edward J. Carlough, President and Central Florida Sheetmetal Contractors Association, Inc., et al.,* 234 NLRB No. 162 and held that a trustee of a joint trust fund was not a collective bargaining agent of the union within the meaning of Section 8 (b) of the National Labor Relations Act?

6. Is the decision of the United States Court of Appeals, Eighth Circuit, in conflict with this court's decision in *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U. S. 157, 170 (1971)? Is the decision in conflict with *National Labor Relations Board v. Carpenters' Local 1913 (Fixtures Unlimited)*, 531 F. 2d 424 or USCA (9th Cir.) 1976?

STATUTES INVOLVED

29 U. S. C. § 158 (b) provides in relevant part:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

. . .

(4) (i) to engage in, or to induce or encourage an individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

. . .

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . .: *Provided*, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

Employee Retirement Income Security Act, hereinafter referred to as ERISA, Section 404 (a) (1) provides in part:

29 U. S. C. § 1104 (a) provides:

"Subject to Sections 403 (c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;"

This matter also involved alleged violations by Petitioner of National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U. S. C. Sec. 151 et seq., 29 U. S. C. § 158 (b) (4)-(Sec. 8 (b) (4) (i) (ii) of the Act), 29 U. S. C. § 158 (b)-(Sec. 8 (b) of the Act), 29 U. S. C. § 158 (b) (4)-(Sec. 8 (b) (4) (B) of the Act) and 29 U. S. C. 158 (b) (7)-(Sec. 8 (b) (7) (C) of the Act).

STATEMENT OF THE CASE

A. Essential Evidentiary Facts.

The alleged contumacious conduct in this case involves union picketing and picketing by a union fund trustee involving related coercions for the purpose of causing

neutral secondary employers to cease doing business with other employers with whom the union had a primary labor dispute. The challenged conduct occurred at three construction sites in eastern Nebraska. In all three cases, the Master found and the circuit Court affirmed his decision that the union had unlawfully attempted to force either a subcontractor or a general contractor at a general situs to cease doing business with other employers.

At two of the construction sites involved herein, the Army Reserve Center site in Fremont, Nebraska and the Glad Tidings Assembly Church site in Omaha, Nebraska the alleged unlawful activity included picketing of other employers by a union fund trustee on behalf of the Contractors, Laborers, Teamsters and Engineers Health and Welfare and Pension Trusts (the CLT & E Trusts) to enforce contribution requirements in which the secondary employers were asserted to be delinquent. The picketing at these two sites was by a union trustee of the CLT & E Trust, Leonard J. Schaefer, who also is the union's business manager and secretary-treasurer.

With respect to the Army Reserve Center site in Fremont, Nebraska, on October 22, 1975 picketing signs appeared stating that Knudson was not abiding by the provisions of the CLT & E Health and Welfare and Pension Funds. The legend on the picket signs read as follows:

> KNUDSON, INC. REFUSES TO ABIDE BY THE PROVISIONS OF THE CLT & E HEALTH & WELFARE & PENSION TRUSTS. THIS DISPUTE WITH ABOVE EMPLOYER ONLY. LEONARD J. SCHAEFER, TRUSTEE.

(See paragraph 19 of the Master's Report, Appendix B.) Again the picket appeared on the same site at the south-

west gate for Kahler on October 23, 1975 with the following legend:

> KNUDSON, INC. REFUSES TO ABIDE BY THE PROVISIONS OF THE CLT&E H.&W. & PENSION TRUSTS. THIS DISPUTE WITH ABOVE EMPLOYER ONLY. Leonard J. Schaefer, Trustee.

(See paragraph 20 of the Master's Report, Appendix B.) The picketing by the union trustee contained a different legend from the picketing of employer at this construction site by the union.

The second construction site involved herein is the Glad Tidings Assembly Church site in Omaha, Nebraska. On March 29, 1976 the union picketed Glad Tidings Assembly Church site entrances directed against Underwood Contractors, Inc. for alleged failure to sign an agreement with the union. Thereafter, the union trustee, Leonard J. Schaefer, picketed the construction site of Underwood Contractors, Inc. for failure to abide by the provisions of the Health and Welfare and Pension Fund Agreements.

The above evidentiary facts, found by the Master and affirmed by the Circuit Court of Appeals, constitute the essential factors for consideration of this Petition. The Master found at the Fremont, Nebraska site that there was a valid basis for a dispute between the Trust and Knudson as to the posting of a cash bond. (See paragraph 24 of Master's Report, Appendix B.) The Master further found that Leonard J. Schaefer is both a union trustee on six trusts as well as respondent's business manager and secretary-treasurer. (See paragraph 23 of Master's Report, Appendix B.) The Master further

found that pursuant to authority of the trusts the trustees are allowed to take action to picket for delinquencies. (See paragraph 23 of Master's Report, Appendix B.)

The legend in the Glad Tidings Assembly Church site on the picket sign contained the following statement:

> UNDERWOOD CONSTRUCTORS, INC. REFUSES TO ABIDE BY THE PROVISIONS OF THE CLT &E HEALTH & WELFARE & PENSION TRUSTS. THIS DISPUTE WITH ABOVE NAMED EMPLOYER ONLY. LEONARD J. SCHAEFER, TRUSTEE.

(See paragraph 33 of Master's Report, Appendix B.)

B. The Master's Findings.

In each of the above described cases the Master found that the union unlawfully attempted to force either a subcontractor or a general contractor at a common situs to cease doing business with another employer. The Special Master found that the picketing by the union trustee of the CLT & E trust was pretextual in nature and, in both cases, the Army Reserve Center at Fremont, Nebraska and the Glad Tidings Assembly Church in Omaha, Nebraska, a purpose of impermissibly furthering union goals by causing a cessation of business both primary and secondary employers. The Special Master found that the picketing at these two sites by the union trustee was essentially for proscribed purposes under Section 8 (b) of the Labor Management Relations Act.

C. Decision of the Court of Appeals.

The Court of Appeals affirmed the Special Master's findings and found that the fact patterns at both the

Army Reserve Center site and Glad Tidings Assembly Church site share three common elements: (1) In both instances the secondary employer against whom CLT & E trust picketing was directed had not posted a required cash bond in support of its obligations to the trust funds, though apparently neither secondary employer was apprised of this requirement before CLT & E trust picketing against it began. (2) The picket signs directed against the secondary employers at the Army Reserve Center and Glad Tidings Assembly Church sites identified the alleged trust-oriented purpose of the picketing and were attributed to "Leonard J. Schaefer, trustee." (3) Lastly, from the circumstances surrounding the picketing, it is apparent that a primary object thereof at both construction sites was to cause a cessation of business between neutral secondary employers and an employer at the jobsite with whom the Union had a primary labor dispute. The Circuit Court refused to consider the issue presented by this Petitioner as to whether a union trustee of an employee benefit trust authorized by Section 302 (c) (5) of the Labor Management Relations Act is an agent of the union for the purposes of Section 8 (b) of the National Labor Relations Act. The Circuit, as a finding of fact, found that the question presented here is whether Schaefer, who is both a union officer and a trustee, was operating on behalf of the union or the trust funds "when he authorized and directed the picketing of the secondary employers". The Circuit Court affirmed the Master's findings that the purported trust picketing was motivated primarily by a desire to advance union goals.

The Circuit Court opinion recognized that the conduct and responsibility of a trustee of a Section 302

trust is regulated by the Employee Retirement Income Security Act (ERISA). It also recognized, in its decision, the trustees who are both agents and fiduciaries of the trust and also agents of the employee organization who designated them might be placed in a position of conflict of interest. The Circuit found that this case does not pose such a problem. The Circuit Court further found that in this case a benefit plan trustee, using a relatively minor deficiency in employer performance of obligations to the trust as a pretext for picketing intended to promote union goals, does not act solely in the interest of the employee participants and beneficiaries.

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REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals conflicts with the decision of this Court in Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U. S. 157, 170 (1971).

This Court recognized in *Allied Chemical & Alkali Workers of America, Local Union No. 1,* supra, that the union's role in administering the trust fund was of a far different order from its duties as a collective bargaining agent. This recognition of a differentiation of the obligations and duties of a union trustee of an employee benefit fund and a union official's obligations and duties as a union representative becomes significant in this case. Under Section 8 (b) of the Labor Management Relations Act a violation occurs when a labor organization and its

agents engage in proscribed conduct. In *Allied Chemical & Alkali Workers of America, Local Union No. 1,* supra, this Court recognized the difference in the duties and obligations of union trustees and those of union representatives.

The Circuit Court in its decision recognized that the conduct and responsibility of trustees of a Section 302 trust are extensively regulated by the provisions of ERISA. The Court below also recognized the fiduciary obligations of trustees of a Section 302 trust. In its decision, the Court below referred to Section 408 (c) which permits an individual to serve in both capacities as a trustee of a 302 trust as well as an officer, agent or representative of an employee organization. It was also held by the Circuit Court that there is nothing in ERISA or the Labor Management Relations Act to prohibit a person in Schaefer's position to operate in separate spheres as an officer of a union and a Section 302 trustee.

In order to clarify this important question, recognized by this Court in *Allied Chemical & Alkali Workers of America, Local Union No. 1,* supra, and to accommodate the provisions of ERISA and the Labor Management Relations Act with regard to a union trustee and a union agent and their respective duties and responsibilities in each position this Writ should be granted.

2. The decision below conflicts with the decision of the Ninth Circuit Court of Appeals in NLRB v. Carpenters' Local 1913 (Fixtures Unlimited), 531 F. 2d 424, (9th Cir., 1976 and other Circuits).

The very issue presented in this case was considered by the Ninth Circuit in *NLRB v. Carpenters' Local 1913*

(Fixtures Unlimited), 531 F. 2d 424. The Court ruled that the trustees of a qualifying fund were not agents of the collective bargaining parties for the purpose of remedying violations of the Act. There, the Board, finding that the trustees were not agents of the respondent-union, ordered the trust to accept payment and administer the proceeds of a backpay order. The Court held that the trust agreement, on its face, established no such agency relationship: "An agent acts for and on behalf of his principal and subject to his control. A trustee acts for the benefit of the beneficiaries of the trust . . ." *NLRB v. Carpenters, Local 1913,* supra. The Court ultimately affirmed the Board's order, but on the grounds that acceptance by the trustees of the backpay contributions from the respondent-union, on behalf of the discriminatee, would not be inconsistent with their fiduciary duty and otherwise would not violate Section 302 of the Labor Management Relations Act.

Court and Board decisions have implicitly recognized that trustees who administer trust funds, like Schaefer in this case, do not act as representatives or agents of the union for purposes of collective bargaining and consequently in picketing as a trustee are not acting as an official or agent of a labor organization.

In *Miniard v. Lewis,* 387 F. 2d 864 (CA D. C. 1967), cert. denied 393 U. S. 873, an employee alleged that the trustees of the predecessor to the Funds involved in this case had breached their duty of fair representation, imposed by the Act upon unions, by excluding him from the Fund's coverage. See *Vaca v. Sipes,* 385 U. S. 895 (1967). The Court held there was no such duty:

> The allegation is founded on a union's duty to represent, equally and without discrimination, the interest of all employees in the bargaining unit. Even though the Fund here resulted from bargaining between the employer and the union, we believe that the traditional duty owed by a Union to its members is not applicable. Rather, the Trustees' duties are those of fiduciaries because as Trustees they perform separate functions and do not act as representatives of either employers or the union.

Blankenship v. Boyle, 329 F. Supp. 1089 (D. D. C. 1971), *Lamb v. Carey,* 498 F. 2d 789 (C. A. D. C. 1974) and *Toensing v. Brown,* 374 F. Supp. 191 (N. D. Cal. 1974, aff'd 528 F. 2d 69 (C. A. 9, 1975) stand for the proposition that trustees of Section 302 trusts are first and foremost fiduciaries, owing a duty of undivided loyalty to the plan beneficiaries.

The question of contempt in this case consequently revolves around the Circuit Court's finding that Schaefer acted in a single capacity as an agent of Respondent and as a trustee of the trust funds. If he was not considered an agent of the Respondent, the picketing of Knudson and Underwood did not constitute contempt of this Court's decree and order. A decision by this Court that a trustee of a Taft-Hartley Trust is also an agent of a labor organization would have broad ranging unfortunate consequences. Chiefly it would place Taft-Hartley trustees in a virtually impossible position regarding the proper execution of their fiduciary duties and responsibilities to the plan participants and beneficiaries. The Respondent respectfully urges the Court to conclude that the Circuit Court's decision was erroneous in finding that Schaefer is both an agent of the Respondent and the trust.

3. The case presents an important question of law which should be decided by this Court and presents a question of whether or not a union trustee of an employee benefit trust, who is also an agent of a union, is an agent or representative of the union for purposes of Section 8(b) of The Labor Management Relations Act.

Taft-Hartley trustees are fiduciaries subject to the requirements of Title I of ERISA, particularly the fiduciary responsibility provisions of Part 4 of Title I. Accordingly, ERISA Section 404 (a) (1) imposes upon such trustees the duties, *inter alia,* to act solely in the interest of the plan's participants and beneficiaries, and to act prudently in the discharge of their trustee responsibilities. These ERISA duties embody a federal codification and elaboration of the common law prudent man rule and the requirement of undivided loyalty to the trust beneficiaries.

The common law of fiduciary loyalty is clearly set forth by the commentators. Bogert states:

> One of the most fundamental duties of the trustee is that he must display throughout the administration of the trust complete loyalty to the interests of the *cestui que* trust, and must exclude all selfish interest and all consideration of the welfare of third persons . . . Reasons behind the establishment of the loyalty rule by equity are that it is generally, if not always, humanly impossible for the same person to act fairly in two capacities and on behalf of two interests in the same transaction.[1]

What the author says is simply a restatement of the age old admonition that no man can serve two masters.

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1 Bogert, *Trusts and Trustees,* 2nd Ed., § 543.

The duty to "exclude . . . all consideration of the welfare of . . . third persons" can be satisfied only by a trustee whose discretion to act solely in the interest of the plan's participants and beneficiaries is not simultaneously limited by duties as collective bargaining agent for either management or labor. As the Board has previously noted, "The purpose of Section 8 (b) (1) (B) is to assure to the employer that its selected collective-bargaining representatives will be completely faithful to its desires".[2] The demands placed on a person who is in fact a collective-bargaining representative may be in direct conflict with those duties ERISA places on a trustee.

Although ERISA contains numerous provisions recognizing the peculiarities of Taft-Hartley plans and the need to accommodate the particular needs of Taft-Hartley trustees, no exception is made for them from the duties imposed generally on all fiduciaries under ERISA Section 404. For example, Section 402 (c) (1) states explicitly that a plan may provide that any person or group of persons may serve in more than one fiduciary capacity in the same plan, including service both as trustee and administrator. Section 408 (c) (3) provides expressly that the prohibited transaction provisions shall not be construed to prohibit a fiduciary from serving as a fiduciary of a plan in addition to being an officer, employee, agent or other representative of a party in interest to the plan,

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2 *Local Union No. 2150 IBEW, AFL-CIO (Wisconsin Electric Power Company),* 192 NLRB 77, at 78. The quoted language is not affected, except possibly to be re-emphasized, by the Supreme Court's subsequent decisions in *Florida Power & Light Co. v. International Brotherhood of Electrical Workers, Local 641, et al.,* 417 U. S. 790 (1974).

such as the employer whose employees are covered or the union for whose members the plan was established.

Although the legislative histoy of ERISA is replete with references to jointly administered Section 302 trusts,[3] there is no evidence there that Congress ever considered a Taft-Hartley plan trustee to be a representative, in the bargaining agent sense, of any party involved with the trust.

Thus, while the Taft-Hartley model of employee benefit plan trusteeship was frequently before Congress during its years of consideration of ERISA, Congress chose to apply to these, as to other employee benefit plan trustees, standards of fiduciary responsibility requiring absolute and undivided loyalty to the plan participants and beneficiaries.

The legislative history of Section 302, Labor Management Relations Act does not shed any helpful light on the question whether collective-bargaining agent status should be ascribed to the management and labor trustees in a jointly administered trust.[4] Enacted by Congress in an attempt to remedy perceived abuses, including possibly unbridled development of the "union slush fund," the legislation structurally and realistically approaches these

3 See, e. g., Legislative History of the Employee Retirement Income Security Act of 1974, (hereinafter, Legislative History, ERISA), Vol. II, pp. 3368, 3478-79.

4 The single significant feature revealed by the legislative history of Section 302 was Congress' concern with the operation of the United Mineworkers welfare funds by John L. Lewis. See the remarks of Senator Taft, Legislative History of the Labor Management Relations Act, 1947, (hereinafter Legislative History, Labor Management Relations Act) Vol. 2, pp. 1310-1313, and the remarks of Senator Ball, p. 1498.

plans as the product, rather than the forum for extension, of collective bargaining. The recurring theme of the curative aspects of Section 302 was that henceforth, such trusts would be subject to joint labor-management administration or management. The general discussion available in connection with the adoption of legislative provisions for joint administration for Section 302 trusts is consistent with the view that Congress viewed them only as the product of collective bargaining, rather than as a continuation thereof.

The use of the term "respresentative" in Section 302 is not explained by the legislative history. During its consideration of the Labor Management Relations Act, the Senate adopted an amendment to Section 302 which included an explicit definition of "representative" as used in that section.[5] However, this definition was not included in the statute as passed by Congress and the only definition for "representative" is that of Labor Management Relations Act Section 2 (4). Accordingly, the Secretary believes that Section 302 uses the term "representatives" in its generic sense.

The legislative history of Section 8 (b) (1) (B), finally, does not contain any discussion of the role of employee benefit plan trustees; there is not suggestion they were to be considered represenatives for the purposes of collective bargaining or the adjustment of grievances. The clear concern of Congress when it adopted Section 8 (b) (1) (B) was union attempts to force employers to bargain on an industry wide basis.[6] And as the Supreme Court

5 Legislative History, Labor Management Relations Act p. 1303.

6 Legislative History, Labor Management Relations Act, pp. 1012, 1077.

pointed out in *Florida Power & Light Co. v. International Brotherhood of Electrical Workers, Local 641, et al.*, 417 U. S. 790, 803 (1974), in which the legislative history of Section 8 (b) (1) (B) is quite comprehensively reviewed:

> Both the language and the legislative history of Section 8 (b) (1) (B) reflect a clearly focused congressional concern with the protection of employers in the selection of representatives to engage in to particular and explicitly stated activities, namely collective bargaining and the adjustment of grievances.

It is common for the individuals who are Taft-Hartley trustees to be union and management officials—often the very same officials who, at collective bargaining sessions, sit across the able from each other and negotiate their differences. As previously noted, ERISA expressly recognizes this fact of life by providing in Section 408 (c) that service as a plan fiduciary by a person who is an officer, employee, agent or other representative of a party in interest (such as a contributing employer or a sponsor union) shall not be construed to be prohibited by ERISA's prohibited transactions provisions. But when they sit as trustees, these persons may not be required to dilute their duty of loyalty to their plan's participants and beneficiaries by considerations of loyalty to their principals. In the discharge of their duties respecting their plans, Taft-Hartley trustees can meet ERISA's standards without ignoring the legitimate concerns of their principals—indeed, they may consider those interests, and in practice can often reconcile them with those of participants and beneficiaries. As we have demonstrated the purposes of Section 302, Labor Management Relations Act require no more. Only by adding a duty for trustees to act as collective bargaining representatives imported from other Labor Management Relations Act sections, which have much different aims and histories, could a conflict be created.

In view of the different obligations and duties of a union trustee and a union agent or representative under Section 8 (b) of the Labor Management Relations Act, this case presents an important question of federal law which should be settled by this Court. If Schaefer was not an agent or representative of the union when engaging in picketing as a trustee of an employee benefit fund, the Circuit was in error in assessing contempt against the union for the two projects stated previously in this Petition. Affirming the Court belows decision of contempt as to these projects would, in effect present a collision between two congressional acts, ERISA and Labor Management Relations Act. The important question involved in this case is whether or not, as a matter of law, a union trustee of an employee benefit fund is also an agent of the union for the purposes of Section 8 (b) of the Labor Management Relations Act. Sustaining the contempt by this Court would create a legalistic collision between two congressional enactments, ERISA and the Labor Management Relations Act. This creates an important matter for this Court to decide.

4. The Board itself in Sheet Metal Workers International Association and Edward J. Carlough, President and Central Florida Sheetmetal Contractors Association, Inc., et al., 234 NLRB No. 162, has found that a trustee of a joint trust fund is not a collective bargaining representative

or agent of the Union; The National Labor Relations Board is in a conflicting position in this matter in attempting to assert contemptuous conduct on the part of the Union for activities of a union trustee of an employee benefit fund. The Board claims contempt in this case when it concluded that trustees are not collective bargaining-representatives in the above case within the meaning of Section 8(b)(1)(B) of the Labor Management Relations Act. This presents a serious question of Federal Law and accommodation in this matter which this Court should consider.

Another reason for granting this Petition is that the Board itself has considered this matter and in *Sheet Metal Workers' International Association,* supra, has also held that a trustee of a joint trust fund is not a collective bargaining agent of a union. The Board in the above case austensibly held that as a matter of law and not as a finding of fact. In this case, the Circuit Court found the picketing of a trustee to be pretextual and, in effect, to espouse the union's interest. The Circuit stated this was a finding of fact thus ignoring the finding of law as to agency.

In this case, there is no question that Schaefer was a trustee of the CLT&E Trust as well as business manager of the Respondent. In view of this decision of the Board it is astonishing that the Board proceeded with a contempt citation in the Circuit Court in this case. If Schaefer was not an agent of the union, the union could not have violated Section 8 (b) of the Labor Management Relations

Act. This Special Master (See Appendix B) recognized that secondary employers were delinquent and were in violation of the trust agreements; the Circuit Court termed these delinquencies and violations as minor in nature. However, in the above case, the Board itself does not consider a union trustee of an employee benefit fund as an agent or representative of the union for purposes of Section 8 (b) of the Labor Management Relations Act. This situation should be considered by this Court and constitutes another reason for granting the Petition.

—o—

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID D. WEINBERG

Attorney for Petitioner, Construction & General Laborers' Union, Local 1140, affiliated with International Laborers' Union of North America, AFL-CIO.

—o—

CERTIFICATE OF SERVICE

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National Labor Relations Board
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The Honorable Wade H. McCree, Jr.
Solicitor General of the United States
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Washington, D. C. 20530

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19,297

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

CONSTRUCTION & GENERAL LABORERS' UNION LOCAL 1140, affiliated with International Laborers' Union of North America, AFL-CIO,

Respondent.

ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

Submitted: March 15, 1978

Filed: May 8, 1978

Before VAN OOSTERHOUT, Senior Circuit Judge, HENLEY, Circuit Judge, and HANSON,* Senior District Judge

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HANSON, Senior District Judge

This matter comes before us on the exceptions filed by petitioner National Labor Relations Board (the Board) and respondent Construction & General Laborers' Union

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*The Honorable William C. Hanson, Senior District Judge, Southern District of Iowa, sitting by designation.

Local 1140 (the Union) to the report of the Special Master[1] submitted pursuant to this Court's Order of Reference of December 16, 1975. We reject the respective exceptions of the parties, adopt the Special Master's finding that the Union is in contempt of this Court's prior orders of May 13, 1968 and February 9, 1972 for having engaged in proscribed secondary activity at three separate construction sites in Nebraska, and assess a fine and impose other sanctions as delineated below.

On May 13, 1968 this Court entered a consent decree enforcing an order of the Board against the Union. Among other things, said decree directed respondent to cease and desist from:

> (a) Inducing or encouraging individuals employed by . . . any . . . employer or person engaged in commerce or in an industry affecting commerce, to engage in a strike or refusal in the course of their . . . employment to use, manufacture, process, transport, or otherwise handle or work on any goods, materials, articles, commodities, or to perform any services, where an object thereof is to force or require any . . . employers or persons to cease doing business with . . . any other employer or person.
>
> (b) Threatening, coercing or restraining . . . any . . . employer engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require any employers or persons to cease doing business with . . . any other employer or person.

The above language tracks pertinent portions of Section 8 (b) (4) (B) of the National Labor Relations Act (NLRA) as amended by the Landrum-Griffin Act of 1959,

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1 The Honorable Robert Van Pelt, Senior District Judge, District of Nebraska.

29 U. S. C. §§ 158 (b) (4) (B).[2] The Act condemns as an unfair labor practice certain kinds of union activity an object of which is to enmesh neutral secondary employers in primary labor disputes between the union and another employer. *See, e. g., Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U. S. 369, 386-90 (1969); *NLRB v. Carpenters District Council of Kansas City*, 383 F. 2d 89, 93-94 (8th Cir. 1967).

On March 9, 1971 the Board sought an adjudication from this Court that the Union was in civil contempt of the 1968 decree. Acting upon the report and recommenda-

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2 29 U. S. C. § 158 (b) provides in relevant part:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> . . .
>
> (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
>
> . . .
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . : *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing[.]

tion of a Special Master,[3] the Court entered an order, to which the Union consented, finding respondent Union in civil contempt. In said order, dated February 9, 1972, the Court directed the Union to purge itself of contempt by adhering to the command of the 1968 decree, viz., by refraining from the type of activity prohibited by Section 8 (b) (4) (B). The order went on to warn

> [T]hat upon the failure of the respondent, its officers, agents, successors and assigns, to comply with any of the purgation provisions hereinabove provided by this order, this Court will deal further with the matter by imposing a fine of $5,000 on the respondent, and an additional fine of $500 per day so long as such non-compliance of this order or of the decree continues, and by such other means as the Court shall determine, including the issuance of body attachment upon any officer or agent responsible for such non-compliance.

The Board returned to this Court on August 22, 1975 alleging respondent Union's violation of the 1968 judgment and 1972 purgation order and seeking a second contempt adjudication. This Court subsequently appointed Senior District Judge Van Pelt as Special Master to take evidence and make recommended findings of fact and conclusions of law. Prior to the hearing before the Special Master, amendments to the Board's August 22, 1975 motion were permitted in order to embrace two other alleged instances of contumacious conduct. The Special Master's report was filed November 14, 1977. The Master found that the Union had engaged in secondary activity

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3 The Honorable Robert Van Pelt, Senior District Judge, District of Nebraska, was also designated as Special Master in the prior proceeding.

violative of the 1968 and 1972 orders and recommended sanctions as hereinafter discussed.

I.

As the party seeking a contempt adjudication, the Board bears the burden of establishing such contempt by "clear and convincing evidence." *NLRB v. Ralph Printing and Lithography Co.*, 433 F. 2d 1058, 1062 (8th Cir. 1970), *cert. denied*, 401 U. S. 925 (1971). Upon review of a Special Master's findings of fact in this regard, we are required to sustain said findings unless they are clearly erroneous. Rule 53 (e) (2), F. R. Civ. P.; *Ralph Printing, supra* at 1063. We have carefully reviewed the factual findings of the distinguished Special Master and find that they are abundantly supported by the evidence. Similarly, we discern no error in the Master's application of the relevant law. Thus, we conclude that the Board has, by clear and convincing evidence, demonstrated that the Union engaged in unlawful secondary activity proscribed by the Court's prior decrees of May 13, 1968 and February 9, 1972.

II.

Though we reject the Union's arguments on appeal insofar as they are premised on challenges to the Master's factual findings, the Union attempts to raise one legal issue which merits comment by the Court.

The alleged contumacious conduct involved Union picketing and related coercive acts for the purpose of causing neutral secondary employers to cease doing business with other employers with whom the Union had a primary labor dispute. The challenged conduct occurred at three construction sites in eastern Nebraska. In each case the Master found that the Union had unlawfully at-

tempted to force either a subcontractor or general contractor at a common situs to cease doing business with another situs employer. *See, e.g., NLRB v. Denver Building Construction Trades Council,* 341 U. S. 675, 685-90 (1951); *Bricklayers and Stone Masons Local No. 2 v. NLRB,* 562 F. 2d 775, 784-85 (D. C. Cir. 1977); *Bryant Air Conditioning and Heating Co. v. Sheet Metal Workers Local 541,* 472 F. 2d 969, 971-72 (8th Cir. 1973).

At two of the construction sites in question—the Army Reserve Center site in Fremont, Nebraska and the Glad Tidings Assembly Church site in Omaha, Nebraska—part of the alleged unlawful activity included picketing of secondary employers[4] purportedly on behalf of the

4 The secondary employers in question were general contractor Knudson, Inc., at the Reserve Center site, and masonry subcontractor Underwood Constructors, Inc., at the Glad Tidings site. Three other subcontractors were also affected by picketing directed at Underwood. The Court notes that though Underwood had a primary labor dispute with the Union before the CLT&E trust picketing occurred, at the time of said picketing that dispute had been resolved.

At the Glad Tidings site, the Union also picketed the general contractor with whom it concedely had a primary labor dispute, Lanco Corporation. The Board, through its own offices, dismissed a complaint against the Union with respect to the Lanco picketing, for the Board concluded said picketing was protected publicity picketing within the ambit of the second proviso of Section 8 (b) (7) (C). 29 U. S. C. § 158 (b) (7) (C). *Construction Laborers International Union, Local 1140 (Lanco Corporation),* 227 NLRB No. 182 (1977). The Union apparently argues that the Board's dismissal of an alleged Section 8 (b) (7) (C) violation for activity directed at Lanco is inconsistent with its attempt to cite the Union for contempt in connection with Union activity directed at Underwood Constructors. This contention is without merit. The legality of primary activity against Lanco is not related to the question whether the Union's activity against Underwood constituted an attempt to unlawfully enmesh neutral employers in the Union's dispute with Lanco.

Contractors, Laborers, Teamsters, and Engineers Health and Welfare and Pension trusts (the CLT&E trusts) to enforce contribution requirements in connection with which said secondary employers were asserted to be delinquent. The picketing was arranged by a Union trustee of the CLT&E trusts, Leonard J. Schaefer, who also serves as the Union's business manager and secretary-treasurer. The Union argues that the picketing to enforce trust fund contribution requirements cannot be attributed to the Union since Schaefer was acting as a trustee in arranging the picketing.

The Special Master found, in essence, that the CLT &E trust picketing was pretextual and had, in both cases, a purpose of impermissibly furthering Union goals by causing a cessation of business between primary and secondary employers. On the facts found by the Master, this conclusion is compelling.

The fact patterns at both the Reserve Center site and Glad Tidings Church site share three common elements: (1) In both instances the secondary employer against whom CLT&E trust picketing was directed had not posted a required cash bond in support of its obligations to the trust funds, though apparently neither secondary employer was apprised of this requirement before CLT&E trust picketing against it began. (2) The picket signs directed against the secondary employers at the Reserve Center and Glad Tidings sites identified the alleged trust-oriented purpose of the picketing and were attributed to

"Leonard J. Schaefer, trustee."[5] (3) Lastly, from the circumstances surrounding the picketing, it is apparent that a primary object thereof at both construction sites was to cause a cessation of business between neutral secondary employers and an employer at the jobsite with whom the Union had a primary labor dispute.

The Union incorrectly asserts that the issue presented by these circumstances is whether a union trustee of an employee benefit trust authorized by Section 302 (c) (5) of the Labor Management Relations Act (LMRA), 29 U. S. C. 186 (c) (5), is an agent of the union for the purposes of Section 8 (b) of the NLRA. *Cf. NLRB v. Carpenters Local No. 1913,* 531 F. 2d 424, 426-27 (9th Cir. 1976). To the contrary, the question here is simply whether Schaefer, who is both a union officer and a trustee, was operating on behalf of the Union or the trust beneficiaries when he authorized and directed the picketing of secondary employers. This is a finding of fact. We read the Master as finding that the purported trust picketing was motivated primarily by a desire to advance Union goals.[6] As noted, that finding is not clearly erroneous.

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5 For example, the picket sign directed against Underwood Constructors at the Glad Tidings site read:

> UNDERWOOD CONSTRUCTORS, INC. REFUSES TO ABIDE BY THE PROVISIONS OF THE CLT&E HEALTH & WELFARE & PENSION TRUSTS. THIS DISPUTE WITH ABOVE NAMED EMPLOYER ONLY. LEONARD J. SCHAEFER, TRUSTEE.

6 In this regard, the Master stated that:

> . . . [T]he trust can hardly be considered a separate entity here even though that is the union's position. Leonard Schaefer is both an agent of the union and of the trust.

(Continued on next page)

We are mindful of the fact that the conduct and responsibilities of trustees of a Section 302 trust are extensively regulated by the provisions of the Employee Retirement Income Security Act of 1974 (ERISA). 29 U. S. C. § 1001 *et seq.* We recognize also that if, as a general proposition, Section 302 trustees were viewed in the discharge of their trust duties as both fiduciaries and agents of the employer or employee organization who designated them,[7] the trustees might in some circumstances be placed in a position of conflict of interest. *See Nedd v. United Mine Workers of America,* 556 F. 2d 190, 209-10 (3d Cir. 1977), *cert. denied,* 46 U. S. L. W. 3436 (Jan. 9, 1978); *Toensing v. Brown,* 528 F. 2d 69, 72 (9th Cir. 1975); *Marshall v. Snyder,* 430 F. Supp. 1224, 1231-32 (E. D. N. Y. 1977); *Blankenship v. Doyle,* 329 F. Supp. 1089, 1094 (D. D. C. 1971); *Sheet Metal Workers' International Assoc.,* 234 NLRB No. 162 (March 8, 1978). This case, however, does not pose such a problem.

(Continued from previous page)

The Union predicates its statement of the issue largely on the above language of the Master. Under the pertinent provisions of both the Labor Management Relations Act and the Employee Retirement Income Security Act of 1974, it is clear that trust funds for the benefit of employees are separate entities apart from labor organizations. A trustee of such a fund may also, however, be the agent of the union in other contexts. 29 U. S. C. § 1108 (c) (3). *See Curren v. Freitag,* 432 F. Supp. 668, 672 (S. D. Ill. 1977).

Reading the quoted language in the context of the Master's report as a whole, we view the Master as concluding only that regardless of the designation on a picket sign, the secondary picketing at both the Reserve Center and Glad Tidings sites was attributable to the Union.

7 *See* 29 U. S. C. § 186 (c) (5) (B).

Section 408 (c) (3) of ERISA permits an individual to serve as a Section 302 trustee "in addition to being an officer, employee, agent, or other representative" of an employer or employee organization. 29 U. S. C. § 1108 (c) (3). Thus, there is nothing in ERISA or the LMRA to prohibit a person in Schaefer's position from operating in separate spheres as an officer of a union and a Section 302 trustee. However, ERISA Section 404 (a) (1) admonishes trustees to discharge their fiduciary duties "solely in the interest of the participants and beneficiaries" of the benefit plan and "for the exclusive purpose of . . . providing benefits to participants and their beneficiaries."[8] 29 U. S. C. § 1104 (a) (1). Clearly, a benefit plan trustee who, as here, uses a relatively minor deficiency in employer performance of obligations to the trust as a pretext for picketing intended to promote union goals, does not act solely in the interest of the employee participants and beneficiaries. It follows that Schaefer's conduct intended to support the interests of a third party (the Union) was beyond the scope of his authority as a trustee. Accordingly, we hold only that in using his position as trustee to accomplish Union objectives, Schaefer was acting not as a trustee, but as a Union agent. The designation on a picket's placard and the existence of a dispute, however minor, between a Section 302 trust fund and an employer does not insulate a labor union from responsibility under Section 8 (b) of the National Labor Relations Act for what is manifestly union conduct.

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8 The duty thus imposed on benefit plan trustees is similar to a trustee's fiduciary duty under traditional common law. See Bogert, *Trusts and Trustees* § 543, at 473-74.

III.

Our purgation order of February 9, 1972 provided that in the event of non-compliance therewith "this Court will deal further with the matter by imposing a fine of $5,000 on the respondent, and an additional fine of $500 per day so long as such non-compliance . . . continues. . . ." Whether the $5,000 figure would apply to each separate incident of unlawful activity is not completely clear from the 1972 order. In any event, we consider a total fine of $19,000 to be fully sufficient in the circumstances here. This figure represents $5,000 plus $500 per day for a total of 28 days on which the Master found the Union engaged in unlawful activity. We emphasize that we determine the amount of the fine here on the basis of what we deem to be just, and not necessarily because we feel that our 1972 order locks us into a specific amount.

Both the Master and the Board suggest that we style an order indicating that a fine against the Union at twice the rate employed here will ensue in the event of a recurrence of contumacious conduct. We have adopted this suggestion as an appropriate indication of the severity with which we would likely view a third contempt adjudication. In so doing, however, we stress that no specific fine would follow automatically. An appropriate sanction would, in the final analysis, be a function of the nature of the conduct and the length of intervening time in which the Union has complied with our orders.

The Board excepts to the Master's recommendation excluding an award of attorney's salaries. We concur with the Master and award costs excluding attorney's salaries.

For all of the foregoing reasons,

IT IS ORDERED that the Master's findings of fact and conclusions of law be and hereby are adopted in their entirety.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Construction and General Laborers Local 1140, AFL-CIO is in civil contempt of this Court and that said Union, through its officers and agents shall purge itself of said contempt by:

1. Paying to the National Labor Relations Board, for deposit in the United States Treasury, a fine of $19,000.

2. Fully complying with and obeying the order of the National Labor Relations Board enforced by this Court's decree of May 13, 1968, and fully complying with and obeying this Court's order on Contempt of February 9, 1972.

3. Immediately posting in conspicuous places in its business offices, meeting halls, and all places where notices to employees are customarily posted, for a period of sixty (60) consecutive days, copies of the Court's order herein, and a notice in the form to be supplied by the Board, signed by an appropriate officer on behalf of the Union, which states that the Union has been adjudged in civil contempt for violating and disobeying the Court's judgment of May 13, 1968 and for violating and disobeying the Court's judgment of February 9, 1972, and that it will forthwith undertake the action ordered in purgation, such notices together with a copy of the contempt adjudication to be maintained in clearly legible condition throughout such posting period, and insure that such notices are not altered, defaced or covered by any other material.

4. Signing and mailing copies of said notice to the Regional Director for the Seventeenth Region of the

Board, for posting by Kealey Construction Company; BDJ Construction Company; Knudson, Inc.; Kahler Construction, Inc.; Lanco Corporation; L. A. Structural, Inc.; and Underwood Constructors, Inc., at their respective offices, if such employers be willing.

5. Signing and mailing copies of said notice and the adjudication to all employers in the construction industry with whom the Union has signed a participation agreement; and furnishing the Regional Director for the Seventeenth Region with a list of all employers to whom said notice and adjudication has been mailed, together with proof of mailing thereof.

6. Reading aloud said notice, by an officer of the Union at the next regularly scheduled or specially called meeting of the membership, whichever is the sooner.

7. Filing separate sworn statements in writing with the Clerk of the United States Court of Appeals for the Eighth Circuit, and a copy thereof with the Regional Director of the Seventeenth Region of the Board within thirty (30) days after the entry of this Court's order and again upon termination of the posting period, showing what steps have been taken by the Union to comply with this Court's decision.

8. Paying the Board all costs and expenses incurred in the preparation for and final disposition of this proceeding, exclusive of attorney's salaries or the expenses of investigation, upon submission by the Board of a verified bill of costs.

In the event of the failure of respondent, its officers and agents to purge itself of contempt as herein provided, this Court will deal further with the matter by considering

the imposition of a compliance fine of $10,000 for each separate place where unlawful secondary activity occurs, together with an additional fine of $1,000 for each additional day on which such unlawful activity continues at each location or locations, and by such other means as the Court may direct, including the issuance of body attachment upon any officer or agent responsible for such non-compliance.

IT IS SO ORDERED.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19,297

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

CONSTRUCTION & GENERAL LABORERS' UNION LOCAL 1140, affiliated with International Laborers' Union of North America, AFL-CIO,

Respondent.

REPORT OF SPECIAL MASTER

APPEARANCES:[1]

For Petitioner: Paul Elkind, Assistant General Counsel for Contempt Litigation, Charles P. Donnelly, Attorney Anne E. Libbin, Attorney,

NATIONAL LABOR RELATIONS BOARD
Washington, D. C. 20570

For Respondent: David D. Weinberg
Weinberg & Weinberg
300 Keeline Bldg.
Omaha, Nebraska 68102

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1 Counsel for charging parties were not permitted to take part in the proceedings but were present throughout the taking of the testimony. They were as follows: Mr. Roger Miller, 820 The Nebraska Savings Building, Omaha, Nebraska, on behalf of Knudson, Inc., 17CC611, and Kealy Construction, Inc., No. 17CC599; and Mr. Edward Hotz, 317 Lakin Building, 8990 West Dodge Road, Omaha, Nebraska, on behalf of Glad Tidings.

VAN PELT, Robert, Senior District Judge, sitting as Special Master

The undersigned, Robert Van Pelt, being the person designated in the Order of Reference, filing No. 46, dated December 16, 1975, for appointment as Special Master, hereby files his report as such Special Master and his recommendations as to findings of fact and conclusions of law, for consideration by the United States Court of Appeals for the Eighth Circuit or a Judge thereof, under the Order of reference above described. The parties are agreed that the first five paragraphs of the Findings of Fact accurately summarize the legal history with respect to the filing of this action. However, the parties are in substantial disagreement as to conversations and occurrences surrounding the picketing of the three construction sites here involved, and it has been necessary for your Special Master to choose between conflicting testimony[2] in order to arrive at the following recommended Findings of Fact.

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2 It is impossible to reconcile the testimony of the witnesses Kealy, Miller and Sunderman. Most noticeably there is considerable testimony by witnesses as to what Mel Goings told them or did not tell them. The deposition of Mel Goings was taken and filed with the Special Master but was never offered in evidence by any of the parties. Your Special Master concludes that Goings' deposition is not in evidence and is not therefore to be considered by your Special Master. It also should be observed that he was not called as a witness. Your Special Master believes that even if the Goings deposition was considered it would not resolve any of the discrepancies in the testimony. The testimony was likewise conflicting for each of the other instances involved.

FINDINGS OF FACTS

1. On May 13, 1968, the Court entered a consent decree herein enforcing an order of the Board issued against respondent Construction and General Laborers' Union Local 1140, affiliated with International Laborers' Union of North America, AFL-CIO (hereinafter "respondent"), its officers, agents, successors and assigns. The decree directed, *inter alia,* that respondent cease and desist from:

> (a) Inducing or encouraging individuals employed by . . . and . . . employer or person engaged in commerce or in an industry affecting commerce, to engage in a strike or refusal in the course of their . . . employment to use, manufacture, process, transport, or otherwise handle or work on any goods, materials, articles, commodities, or to perform any services, where an object thereof is to force or require any . . . employers or persons to cease doing business with . . . any other employer or person.
>
> (b) Threatening, coercing or restraining . . . any . . . employer engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require any employers or persons to cease doing business with . . . any other employer or person.

2. On March 9, 1971, the Board petitioned this Court to adjudicate the Union in civil contempt of this Court's decree of May 13, 1968, and on June 16, 1971, filed an amended petition for contempt adjudication. Thereafter, on February 9, 1972, upon the report and recommendation of United States Senior District Judge Robert Van Pelt, acting as Special Master, the Court duly entered an order consented to by respondent in which the Court ad-

judged respondent in civil contempt of its decree of May 13, 1968, and provided in pertinent part as follows:

> FURTHER ORDERED that said Local 1140, its officers, agents, successors, and assigns shall purge the Union of said contempt by:
>
> (a) Fully complying with and obeying the Board's order as enforced by this Court's decree of May 13, 1968.
>
> (b) Ceasing and desisting from in any manner or by any means, including picketing, orders, directions, instructions, requests, or appeals, however given, made or imparted, or by any like or related acts or conduct, or by permitting any such to remain in existence or effect, engaging in, or inducing or encouraging any individual employed by Wiebe Construction Company, Kilpatrick's Department Store, Burger Transfer and Storage Company, or by any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, or in any manner or by any means threatening, coercing or restraining Wiebe Construction Company, Kilpatrick's Department Store, Burger Transfer and Storage Company, or any other person, where in either case an object thereof is to force or require any person engaged in commerce or in an industry affecting commerce, to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with the Brunswick Corporation or any other person.
>
> FURTHER ORDERED that upon the failure of the respondent, its officers, agents, successors and assigns, to comply with any of the purgation provisions hereinabove provided by this order, this Court will deal further with the matter by imposing a fine of $5,000 on the respondent, and an additional fine of $500 per day so long as such non-compliance of this order or of the decree continues, and by such other means as the Court shall determine, including the issuance of body attachment upon any officer or agent responsible for such non-compliance.

3. On August 22, 1975, the National Labor Relations Board filed a motion in the Court of Appeals for an order assessing a fine, increasing prospective fines, and granting other civil relief against Local 1140, for engaging in conduct in contempt of the May 13, 1968 judgment and in violation of the February 9, 1972 purgation order by picketing a construction project in Lincoln, Nebraska, for the purpose of inducing employees to refuse to work at the project and for the purpose of coercing neutral employer Kealy Construction Company and other persons to cease doing business with BDJ Construction Company. The respondent filed answers to the motion denying that it was in violation of the Court's orders.

4. By order of December 16, 1975, the Court of Appeals designated Robert Van Pelt, United States Senior District Judge for the District of Nebraska as Special Master to hear evidence and make recommended findings and conclusions of law. By order of January 30, 1976, the Court of Appeals granted the Board's motion for leave to amend its motion to allege additional non-compliance with the May 13, 1968 judgment and the February 9, 1972 purgation order, occurring in October 1975. On July 9, 1976, the Special Master granted the Board authority to file its motion for leave to further amend its motion to allege additional non-compliance occurring in March and April 1976. The respondent filed answers to both motions denying the allegations of additional contumacious conduct.

5. The testimony of witnesses was taken on August 30 and 31, and on September 1, 2 and 3, 1976; all of that

testimony has been transcribed and, with the exhibits, accompanies the present report.

6. In May of 1975, a shopping center, the "Van Dorn Plaza" was under construction at Lincoln, Nebraska at 48th and Van Dorn Streets. Kealy Construction Company (hereafter "Kealy") was the general construction contractor (Tr. 22) and subcontracted the masonry, plumbing, asphalt, heating, air-conditioning, and electrical work (Tr. 23). BDJ Construction Company (hereafter "BDJ") was the masonry subcontractor (Tr. 23).

7. Kealy had signed participation agreements with Laborers' Local 1140 (respondent) as well as other trade unions. BDJ had a collective bargaining agreement with Laborers' Local 1140 which expired on April 1, 1975 (Tr. 119, Ex. 8). In May of 1975, BDJ was using one union bricklayer and the three partners were taking turns performing the labor functions of masontending at the Van Dorn Plaza (Tr. 119-121).

8. On Friday, May 23, 1975, respondent's assistant business representative, Norman Sunderman, visited the Van Dorn construction site and talked with Richard Burns, a partner of BDJ (Tr. 123, 892). Sunderman told Burns that BDJ's contract with Local 1140 had expired and he wanted to negotiate another contract (Tr. 892-93, 124). Burns replied that he did not need the union any more (Tr. 893) as the partners themselves were performing the labor work (Tr. 124). Sunderman stated there might be trouble on the job if a new contract were not signed (Tr. 124).

9. Sunderman then spoke with Thomas J. Miller, Kealy's job superintendent (Tr. 897, 61). Sunderman told

Miller that Kealy was straight with the Union, but BDJ was not, and that BDJ would have to get straight or there could be trouble the following Tuesday (Tr. 62, Ex. 7).

10. On Tuesday, May 27, 1975, Sunderman dropped a person with a picket sign off at the Van Dorn construction site prior to the time work was to start (Tr. 901). The picket sign read:

> BDJ CONST. DOES NOT PAY UNION WAGES & WORKING CONDITIONS. LABORERS LOCAL NO. 1140 THIS DISPUTE WITH ABOVE NAMED CONTRACTOR ONLY

(Tr. 65, Ex. 6).

11. Thomas J. Miller observed the picket shortly before 8 a.m. (Tr. 68). The first thing Miller did after seeing the picket was to call John Kealy, then executive vice president at Kealy Construction in Hastings, Nebraska, to inform him of the picket (Tr. 68). John Kealy told Miller to take BDJ off the job (Tr. 35, 112). Following this conversation, Miller spoke with the three partners of BDJ (Tr. 68-69, Ex. 7) and told them he did not think they should work that day; BDJ agreed to leave the site (Tr. 70, Ex. 7).

12. John Kealy made two telephone calls to respondent's Lincoln business office to find out what was needed in order to remove the picket. In the first call Kealy spoke with Mel Goings, who informed him that there was a picket on the project because BDJ was not using union labor and that the picket would not come off until he had a letter or telegram in his hands stating BDJ would not be allowed back on the project without using union laborers (Tr. 27-28). In the second call Kealy learned from Business Agent Mel Goings that Sunderman was handling

this particular picket (Tr. 38). Sunderman then spoke with Kealy and also told him before the picket would be removed they would need to have a letter or telegram stating that BDJ would not be allowed back on the job unless it used union laborers (Tr. 31). John Kealy then sent a telegram to respondent's Lincoln business office which stated:

> AS OF THIS DATE B. D. J. CONSTRUCTION COMPANY WILL NO LONGER BE ALLOWED ON THE VANDORN PLAZA SHOPPING CENTER UNLESS UNION LABOR IS USED.
>
> JOHN KEALY, KEALY CONSTRUCTION COMPANY.

(Ex. 2). The picket was removed at Norm Sunderman's direction after receipt of the telegram (Tr. 905) sometime around 9 a.m. (Tr. 73). No employees performed any work while the picketing was taking place although carpenters, electricians, plumbers, and sprinkler fitters were scheduled to work that morning (Tr. 72). Most of the employees left around 8:30 a.m. (Ex. 7). After the picketing stopped, the electricians worked at the site (Tr. 73).

13. On Friday, May 27, 1975, Bruce Nichelson, one of the BDJ partners, returned to the construction site before 8 a.m. (Tr. 162, 74). He spoke with Thomas J. Miller and asked about returning to work at the construction site (Tr. 163). Shortly thereafter, Miller received a phone call from Mel Goings indicating that there would be trouble if BDJ went back to work (Tr. 74, Ex. 7). Miller then arranged for BDJ to work on Saturday at the site when other employees would not be present (Tr. 75, 163, Ex. 7). The three partners of BDJ worked on Saturday, May 31, for approximately 4-6 hours (Tr. 163, 128-29).

14. On Monday, June 2, 1975, Sunderman visited the construction site and observed the work done by BDJ (Tr. 905). Sunderman then told Miller that he did not want to make trouble and shut the job down, but Kealy would have to pay time and a half to a man designated by Sunderman from the Union's list at the hiring hall for the length of time that BDJ worked on Saturday, May 31, 1975 (Tr. 76). Sunderman called the next day and gave him the name of the man who was to be paid, and later asked if the check had been prepared (Tr. 77). Miller never paid the man and there was no further picketing (Tr. 88).

15. I find that although respondent had a labor dispute (the validity of which is not examined here) with BDJ, respondent (through its agents, Sunderman and Goings) involved neutral employers such as Kealy Construction Company in that dispute by phone calls and statements made on the site and the manner in which the picketing was effected with the purpose of causing such neutral employers, including Kealy, to cease doing business with BDJ Construction Company.

16. In October of 1975 an Army Reserve Center was under construction in Fremont, Nebraska (the Reserve Center). The construction site was approximately a block in size with three entrances (Tr. 314-16). Knudson, Inc., (hereafter "Knudson") was the general contractor on the project (Tr. 179). Knudson, Inc. was also engaged in construction work in Omaha for Lackawanna Leather and Ziebart at the same time as the Reserve Center project. Knudson began work at the Reserve Center in July of 1975 (Tr. 180). Knudson subcontracted the electrical work, heating, plumbing, masonry and some incidental work (Tr. 180). Kahler Construction, Inc. (hereafter

"Kahler") was the masonry subcontractor (Tr. 180-81) and employed four bricklayers and four non-union laborers who did mason-tending (Tr. 281-82). Kahler began work approximately October 7 or 8, 1975 (Tr. 300, 181). Kahler was not one of the subcontractors at the Lackawanna site (Tr. 365).

17. On Thursday, October 16, 1975, respondent's Business Agent for the Omaha area, Richard Otte, appeared at the Reserve Center (Tr. 300-301). Otte located Knudson project superintendent Richard D. Rogers to complain that Kahler's laborers were non-union, and stated he would have to "advertise" if Rogers "didn't get things straightened out" (Tr. 301-302). At all material times thereafter respondent had a primary labor dispute with Kahler. On Friday, October 17, 1975, Richard R. Knudson, President of Knudson, Inc. returned Otte's October 16 call to him (Tr. 181, 174). Otte informed Knudson that Kahler was not using union labor, which he told Knudson "wasn't permissible." Otte wanted Knudson to advise Kahler they would have to get union labor on the job, and Knudson agreed to do so (Tr. 182-183, 930-931, from Otte's deposition 24-25).

18. On Tuesday, October 21, 1975, Otte visited the Reserve Center project and talked with Kahler's job foreman Ronald Mueller, who said Kahler was not going to pay union wages and conditions (Tr. 303, Otte's deposition 31). Otte and Mueller then went into Knudson's trailer and called Arnold Soma, Project Manager for Kahler in Norfolk, Nebraska (Tr. 303, 282-83, Otte deposition 31). Otte requested Soma to have Kahler pay union scale and health and welfare contributions (Tr. 305, 284). Soma did not agree to this (Tr. 285).

19. Otte subsequently told respondent's business manager and secretary-treasurer as well as union trustee (See ¶ 22) Leonard J. Schaefer about the discussions he had with Knudson and Kahler, and that Kahler refused to pay union scale and conditions (Tr. 271-72, Otte's deposition 44-45). Schaefer stated that Knudson was delinquent in contributions to the health and welfare and pension funds and that Knudson had not posted a cash bond (Tr. 271-72, Otte's deposition 44-45). Schaefer instructed Otte to prepare picket signs regarding Knudson's delinquencies, but told Otte to use his own judgment about putting them out (Tr. 270-71, Otte's deposition 43-44). On the morning of Wednesday, October 22, 1975, respondent, under the direction of Otte, caused picket signs to be placed at employee entrances of the Reserve Center project in Fremont and Knudson's Lackawanna Leather proj- in Omaha (Tr. 267-68, Otte's deposition 40-41, 274, Otte's deposition 47, 371-72, 305). The Lackawanna sign stated:

> KNUDSON, INC. REFUSES TO ABIDE BY THE PROVISION OF THE CLT & E HEALTH & WELFARE & PENSION TRUSTS. THIS DISPUTE WITH ABOVE EMPLOYER ONLY. LEONARD J. SCHAEFER, TRUSTEE.

(Tr. 308-09, Ex. 16). A similar picket appeared at the Fremont site (Tr. 372). As a result of the picketing, employees of Knudson, Inc., and other employers not a party to respondent's dispute with Kahler, refused to perform work on October 22, 1975 at both the Fremont and Lackawanna Leather jobsites (Tr. 309-313, 373).

20. On the morning of Thursday, October 23, 1975, Knudson superintendent Rogers erected "reserved gate" signs at the entrances to the Fremont project, establishing the southeast gate for the exclusive use of Knudson, Inc.

employees and suppliers, and the southwest gate for the exclusive use of Kahler employees and suppliers (Tr. 314-17, Ex. 17, Ex. 18). These signs were maintained at the gates throughout the period from October 23 through October 29, 1975 (Ex. 17, Ex. 18, Ex. 23). From Thursday, October 23, 1975 until about Wednesday, October 29, 1975, both the Knudson, Inc. and the Kahler reserved gates were picketed by respondent with signs directed to Knudson, Inc. (Tr. 319-25, 328-34, 343-44, Ex. 19, Ex. 20, Ex. 21, Ex. 22). On October 23, the sign at the southeast gate reserved for Knudson stated:

> INFORMATIONAL PICKET
> KNUDSON, INC. DELINQUENT IN CONTRIBUTIONS TO THE CLT&E HEALTH & WELFARE & PENSION TRUSTS. THIS DISPUTE WITH ABOVE EMPLOYER ONLY. Leonard J. Schaefer, Trustee.

(Ex. 19, Ex. 20). On October 23, the sign at the southwest gate reserved for Kahler stated:

> KNUDSON, INC. REFUSES TO ABIDE BY THE PROVISIONS OF THE CLT&E H. & W. & PENSION TRUSTS. THIS DISPUTE WITH ABOVE EMPLOYER ONLY. Leonard J. Schaefer, Trustee.

(Ex. 21, Ex. 22). Such picketing was conducted at the southwest entrance despite the presence of the sign at that entrance reserving the entrance for Kahler and despite the fact that on October 23, Knudson, Inc. project superintendent Rogers informed the picket, a Mr. Squire Bassett, that he was "picketing the wrong gate" (Tr. 338-340). On Wednesday, October 29, 1975, the same picket, Squire Bassett, appeared at the southwest gate with a Local 1140 sign protesting Kahler's failure to pay union wages and conditions (Tr. 342-46, Ex. 23). The sign stated:

> INFORMATIONAL PICKET
> KAHLER CONST. DOES NOT PAY UNION WAGES & WORKING CONDITIONS. LABORERS LOCAL No. 1140. THIS DISPUTE WITH ABOVE NAMED CONTRACTOR ONLY.

(Ex. 23). On October 29, the southeast gate reserved for Knudson, Inc. was still being picketed by respondent with the "refuses to abide" sign above quoted (Tr. 348-49, Ex. 23). On October 30, there were no pickets at the Knudson gate, and there were two pickets at the Kahler gate protesting Kahler's failure to pay union wages and working conditions (Ex. 24, Tr. 349).

21. Picketing of Knudson at the Lackawanna site continued from October 22, 1975 through October 29, 1975 (Tr. 211-12). Schaefer told Otte to take the Knudson signs down when Knudson had cured their delinquency and Otte personally went to the Reserve Center and Lackawanna site (Otte dep. 52-53, 56). Otte decided to end the picket of Kahler later because he didn't think it was "doing as good a job as I thought it should." (Otte dep. 53).

22. Knudson Construction Company, engaged primarily in subcontracting, was phased out in 1972-73 (Tr. 231-33). Knudson Construction Company had signed a collective bargaining agreement with respondent in 1971 (Tr. 215, Ex. 10). Knudson, Inc., a general contracting company incorporated in 1969, had a collective bargaining agreement with respondent through its contractual relationship with the Council Bluffs Contractors' Association (Tr. 194-95, 201, 204, Ex. 82, Ex. 13). Knudson, Inc. made timely contributions to the Health, Welfare & Pension Plan and was not delinquent at any time in 1975 (Tr. 177,

184, 414, 419-20, Ex. 25, Ex. 26). Although Knudson Construction Company had been requested by letter dated January 6, 1971 (which should have read 1972 and was later corrected) to post a cash bond in connection with the 1971 participation agreement (Ex. 10, 390), such letter was never received by Knudson Construction Company or Knudson, Inc. which have the same offices and same management (Tr. 190, 391). Knudson, Inc. did not receive any request for a cash bond from either the fund trustees or Local 1140 until October 23, 1975, one day after picketing had commenced, as set forth above (Tr. 178, 186, 192-94, 391-92). Knudson received a letter on October 27, 1975 from the trust administrator requesting a bond in accord with the 1971 agreement signed as Knudson Construction Company (Ex. 10). Knudson, Inc. sent two checks to cover the bond for the separate Health and Welfare and the Pension Trusts on October 29, 1975 (Ex. 11). As above noted, there was no picketing of Knudson at the construction sites in Fremont or Omaha after this date.

23. Leonard J. Schaefer is respondent's business manager and secretary-treasurer (Tr. 962). As business manager he oversees the negotiation of collective bargaining agreements and the general affairs of the local union (Tr. 962). Mr. Schaefer serves as a union trustee on six trusts, two of which are the Contractors, Laborers, Teamsters, Engineers (CLT&E) Health and Welfare Trust, and the CLT&E Pension Trust (Tr. 986). There is an Agreement and Declaration of Trust for each fund which specifies the powers and duties of the trustees and provides that no action may be taken by the trustees without a meeting except by unanimous written concurrence (Ex. 28, Art. X, § 3, Ex. 29, Art. VII, § 3) and that all action

shall be by majority decision of the trustees (Ex. 28, Art. X, § 4, Ex. 29, Art. VII, § 4). The minutes of the May 14, 1968 meeting of the trustees of the Health and Welfare Trust show that a motion was made and carried to have the trust administrator notify employers who are not members of the Heavy Contractors Association to post their cash bonds or the trustees would advertise the fact "these delinquencies exist . . ." (Ex. 30). At a Health and Welfare meeting on March 31, 1967, it was approved that "the Trustees take action to collect advance payments from contractors signed to a participation agreement." (Ex. 31). In practice, the union trustees individually make the decisions as to who to picket for delinquencies (Tr. 1062-63).

24. Although there was a valid basis for a dispute between the trusts and Knudson as to the posting of a cash bond, the manner in which the picketing was effected showed that the primary object of the picketing was to cause Knudson, Inc. to cease doing business with Kahler Construction, Inc. in furtherance of respondent's labor dispute with Kahler Construction, Inc. The decision as to putting out the pickets was left up to Richard Otte, one of respondent's business agents. Mr. Otte had called Mr. Knudson personally to inform him that Kahler was using non-union labor, but no one informed Knudson of the bond requirement until after the picketing started and Otte in fact denied any knowledge of why pickets were up against Knudson when Richard Knudson called and talked with him (Tr. 341, 185-186, Otte dep. 48-49). Although Knudson had three jobs on which they were acting as general contractor, and had been on the Fremont site since July, they were not picketed until October,

when the union learned Kahler was a subcontractor on the project using non-union labor.

25. In May of 1975 D & W Construction Co. (hereafter "D & W") began work in Omaha at Glad Tidings Assembly Church site as the general contractor (Tr. 622). In October of 1975, Lanco Corporation (hereafter "Lanco") took over as general contractor from D & W when one of the latter's partners sold his interest in D & W to another partner (Tr. 623). Subcontracts were let by either D & W or Lanco for masonry work (Tr. 586), steel erecting, fabricating of the steel, plumbing and heating and air-conditioning (Tr. 626). Underwood Constructors, Inc. (hereafter "Underwood") was the masonry subcontractor and employed laborers on the job (Tr. 586). Lanco employed persons as carpenter/laborers at the Glad Tidings project, but had no collective bargaining agreement with respondent (Tr. 621).

26. The Glad Tidings construction site is located at the intersection of 75th and Hickory Streets in Omaha, Nebraska (Tr. 775-80, Ex. 63, Ex. 64). Entrances to the site were located on 75th Street (the west gate) and on Hickory Street (the north gate) (Ex. 63, Ex. 64). In addition to the church building, which was being repaired and expanded, the Glad Tidings site contained a parsonage, which was the residence of the church's Assistant Pastor, Lee Crum, at all material times (Tr. 771, 773, Ex. 64). Harry K. Dillon was Vice President of Lanco (Tr. 621). William E. Underwood was Vice President of Underwood (Tr. 580). Underwood began work at the site in approximately October of 1975 (Tr. 625). Underwood was engaged in normal operations at the site until ap-

proximately February 27, 1976 (Tr. 587, 781). They could not proceed with their work at the Glad Tidings site until the structural steel work was completed (Tr. 587). In March of 1976 Underwood had three projects, other than Glad Tidings, in Omaha (Tr. 588). Two of these other projects used laborers (Tr. 589). Underwood did not have any laborers working at the Glad Tidings site during the month of March, although laborers of Underwood did come to the Glad Tidings site to pick up equipment (Tr. 588, 605).

27. Richard Otte, respondent's Business Agent, sent Harry Dillon a letter dated March 17, 1976 requesting that Lanco pay the minimum wages, hours and working conditions and stating:

> [I]f you do not contact us within a period of three days after receipt of this letter in answer to our request, our Union and your company will be in dispute concerning minimum standards established by our organization as to wages, hours and working conditions for workmen who will be employed by you in this area.

(Ex. 41). Harry Dillon received this letter on Saturday, March 20, 1976 (Tr. 627-628) and a picket appeared at the Glad Tidings site on Monday, March 22, directed against Lanco (Tr. 628, 781-783). This picketing continued at the west gate until Thursday, March 25, 1976 (Tr. 781-783).

28. On Thursday, March 25, 1976, Lanco established two separate entrances at the Glad Tidings site in order to avoid enmeshing employees of contractors not a party to its dispute with respondent (Tr. 636-38, 785). The north gate was reserved for the exclusive use of Lanco, its employees and suppliers (Tr. 636, 785-788, Ex. 65). A

sign was placed between the two west gate entrances on 75th Street reserving them for the subcontractors Underwood Construction, L. A. Structural, Southwest Heating, and Phil-Gil Plumbing, their employees and suppliers (Tr. 636). The signs at these reserved entrances were in full view of the persons picketing the site on Thursday, March 25, and at all material times thereafter. When the reserved gate signs were posted, the picketer with respondent's picket sign directed against Lanco moved to the Lanco gate on Hickory Street, and the picketing against Lanco remained at that gate until late May, 1976 (Tr. 790-91).

29. On Friday, March 26, 1976, employees of L. A. Structural entered through the west gate of the Glad Tidings site which was reserved for subcontractors and performed work at the site for the first time since the picketing began (Tr. 791, 638, 783). Lanco employees entered the north gate in spite of the picketing (Tr. 638).

30. On Monday, March 29, 1976, on orders of Business Manager Leonard J. Schaefer, respondent began picketing the west entrance, reserved for the exclusive use of employees and suppliers of neutral subcontractors not a party to the dispute with Lanco (Tr. 639-40, 792-93, 1043, Ex. 66). The picket sign stated:

> LABORERS LOCAL 1140 ON STRIKE FOR A CONTRACT. UNDERWOOD CONSTRUCTORS, INC. THIS DISPUTE WITH THE ABOVE COMPANY ONLY.

(Ex. 66). No subcontractor employees used the gate although L. A. Structural was scheduled to work (Tr. 640-41). This picketing continued on work days through Friday, April 16, 1976 (Tr. 796-98, 825, 831-33, Ex. 67, Ex. 68).

31. Underwood had previously been unincorporated and operating under the name of Quality Builders and upon incorporation the name was changed to Underwood although the operation of the company remained the same (Tr. 583). In 1972 Quality Builders had signed a participation agreement with respondent (Exhibit 40), but Underwood did not have one (Tr. 580, 584). The participation agreement signed by Quality Builders limited itself to "the undersigned employer" and did not mention successor companies formed by the employer. Underwood did not notify respondent of the name change, although they continued paying contributions to the trust funds (Tr. 584), and William Underwood considered himself bound by the 1972 agreement (Tr. 585-86).

32. On Monday, April 5, 1976, William Underwood spoke with respondent's Business Agent Otte and told Otte that he wanted to sign a collective bargaining agreement as Underwood Constructors, Inc. with respondent (Tr. 595). Otte agreed to send him an agreement. On Friday, April 9, 1976, respondent had not mailed the agreement nor stopped picketing and William Underwood went to respondent's office in Omaha and requested and signed a collective bargaining agreement on behalf of Underwood Constructors, Inc. (Tr. 596-97, Ex. 42). This was approved by Leonard Schaefer on April 12, and William Underwood received a copy of it on April 13 (Ex. 42, Tr. 597). However, the picketing for a contract continued through Friday, April 16, 1976, despite the fact a contract had been signed (See ¶ 30).

33. From Monday, April 19, 1976 through April 22, 1976 there was a picket at the subcontractors gate against Underwood advertising:

> UNDERWOOD CONSTRUCTORS, INC. REFUSES TO ABIDE BY THE PROVISIONS OF THE CLT &E HEALTH & WELFARE & PENSION TRUSTS. THIS DISPUTE WITH ABOVE NAMED EMPLOYER ONLY. LEONARD J. SCHAEFER, TRUSTEE.

(Tr. 801-08, Ex. 69, 70, 71, 73, 74). Sometime after this second picket sign against Underwood, William Underwood called Robert Foy, trust administrator, who told him that Underwood was required to post a cash bond (Tr. 600). No cash bond was ever posted (Tr. 602).

34. Throughout the entire time of the picketing of Underwood from March 29 through April 22 (described in paragraphs 29-32) Underwood was not engaged in its normal business on the Glad Tidings site (Tr. 587, 631-32, 780-81, 792). Underwood was not picketed at any of the construction sites at which it was then working or its Council Bluffs office (Tr. 590-594). During the time the picketing of Underwood took place at the west gate reserved for subcontractors, Southwest Heating & Air-Conditioning employees did work (Tr. 809), and L. A. Structural performed work on approximately April 20, two days before the picketing ended, but had refused to work at previous times (Tr. 817). Lanco employees, who were being picketed at the north gate, worked during the picketing (Tr. 809). The pickets did have some effect on obtaining a roofer to do repair work after April 14, as one company representative contacted about the job

stated he would not come on the site as long as there were any pickets against Lanco or Underwood (Tr. 816).

35. An object of respondent's picketing at the reserved gate for subcontractors at the Glad Tidings site was to enmesh neutral employers, including Underwood, L. A. Structural, and others, in respondent's dispute with Lanco, in order to induce and encourage said neutral subcontractors to cease doing business with Lanco, in furtherance of respondent's dispute with Lanco. The following occurred during cross-examination of Leonard J. Schaefer:

> Q. Now you say in connection with the picketing that went on at the Glad Tidings Church back in March and April of 1976 that you didn't have any thought of picketing Underwood until you discovered or you believe [*sic*] that Underwood was on the Glad Tidings site working; is that correct?
>
> A. What I did was first of all picket at Glad Tidings. This happens in numerous occasions where they will then put a gate on, similar to the Knudson project in Fremont when they put a sign up with a gate, and it was the subcontractors. That's when I discovered that Underwood was on it.
>
> Q. Had you been looking for Underwood to picket them before that?
>
> A. Can't say specifically that we was out looking, or I was looking for Underwood, no.
>
> Q. All right, sir. Then specifically when did the idea first come into your head to picket Underwood?
>
> A. When they gated the Glad Tidings project.

(Tr. 1042-3).

CONCLUSIONS OF LAW

The question of whether illegal secondary conduct occurred during a labor dispute is never easy to solve. The Supreme Court has stated:

> Important as is the distinction between legitimate "primary activity" and banned "secondary activity," it does not present a glaringly bright line. The objectives of any picketing include a desire to influence others from withholding from the employer their services or trade.

Electrical Workers Local 761 v. NLRB, 366 U. S. 667, 673 (1961). Likewise, the Supreme Court stated in *Railroad Trainmen v. Jacksonville Terminal Co.,* 394 U. S. 369, 388-89 (1969):

> The problem of delineating the scope of permissible picketing at a "common situs"—a place . . . where both the struck employer and "secondary" or "neutral" employers are carrying on business activities—has been among the most mooted and complex under the Act.

It has been recognized that secondary activity does not occur merely because there was a severe impact on neutral employers, *National Woodwork Manufacturers Assoc. v. NLRB,* 386 U. S. 612, 627 (1967). Nor does secondary activity occur just because primary picketing is accompanied by threats and violence. *United workers v. NLRB,* 376 U. S. 492, 501 (1964); *Federal Prescription Service, Inc. v. Amalgamated Meat Cutters Local P-1149,* 527 F. 2d 269, 274 (8th Cir. 1975).

[In each of the instances here, the Union had some basis for a primary dispute—at the Van Dorn Plaza the Union's collective bargaining agreement with a masonry

subcontractor had expired and the Union Agent saw laborers' work being performed; at the Fremont Reserve Center site a masonry subcontractor was employing four non-union laborers and refused to pay union wages, and at the Glad Tidings site the general contractor had no collective bargaining agreement and a subcontractor had never signed a collective bargaining or participation agreement since changing their name and incorporating.] However, meeting the standards for primary picketing does not conclusively show an absence of illegal secondary activity. *NLRB v. IBEW Local 453,* 432 F. 2d 965, 969 (8th Cir. 1970). Instead, the courts will look at the object of the picketing.

> [P]icketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer. Labor Board v. International Rice Milling, [341 U. S. 665 (1951)]

Electrical Workers, supra at 673-74.

In *NLRB v. Carpenters District Council,* 383 F. 2d 89 (8th Cir. 1967), the union collective bargaining agreement had expired with a millworking company who furnished trim, doors, and cabinets to construction sites via its own trucks and drivers. The union picketed the various construction sites where the millwork was delivered. The union also warned two different construction company superintendents that "they would plan on possibly picketing the job to prevent unloading" and that "if they saw Kaaz's truck out there, they would have a banner on it." *Id.* at 92. The union argued that notifying (threatening)

a neutral employer they intended to engage in protected conduct was a protected activity. The Eighth Circuit responded:

> The legal proposition so stated is a recognized one but it has no controlling application here. The threats, as we have noted, bore on the issue of the union's intent, were part of the background of the case, and, in that light, were not restricted to protected activity.

Id. at 95. *See also Bryant Air Conditioning and Heating Co. v. Sheet Metal Workers' Local No. 541,* 472 F. 2d 969 (8th Cir. 1973) where despite the fact the union argued the statements of intent to picket were not "threatening or coercive" the court found the language and conduct of the union's representative "effectively conveyed the message that unless [the general contractor] kept [the subcontractor] off the jobsite, the union would engage in general picketing." *Id.* at 972.

In *Hirsch v. Building & Construction Trades Council,* 530 F. 2d 298 (3d Cir. 1976) a general contractor who was non-union refused to sign an agreement that it would employ only union subcontractors. The Trades Council began picketing the general contractor's sites. Strescon Industries, Inc. was a subcontractor scheduled to make deliveries to one of the sites. The drivers refused to cross the picket line to make deliveries, so Strescon hired another company to make the deliveries. As a result, Strescon's operations manager received a phone call from a person who identified himself as the business representative of the Trades Council and after ascertaining that another company was going to make deliveries told the operations manager not to be "surprised if you have

pickets on your plant tomorrow." The Third Circuit upheld the finding that § 8(b) (4) (ii) (B) had been violated, even though Strescon's operations manager could not identify the business agent's voice and no picketing of Strescon ever occurred. The Court stated:

> We, however, cannot comprehend how the phone call can be interpreted as anything other than a threat of illegal activity. Certainly, both the tenor and terms of the conversation marked it as such. Moreover, it occurred in the context of a long and bitter dispute between [the general contractor] and the Trades Council, a dispute of which Strescon was fully aware. Finally, Strescon itself considered it a threat as evidenced by the unfair labor practice charges it immediately filed against the Council.

Id. at 305.

In *NLRB v. Plumbers Local 307,* 469 F. 2d 403 (7th Cir. 1972), the Seventh Circuit found the circumstances surrounding the picketing of a construction site indicated an illegal secondary motive despite the fact the picketing complied with the standards for such picketing formulated in Sailors' Union of the Pacific (Moore Dry Dock), 92 NLRB 547 (1950). The factual situation was somewhat similar to what occurred at the Van Dorn Plaza site. A general contractor engaged a subcontractor who was non-union. The president of the general contractor received a call from the president of the Construction Trades Council complaining that the plumbing contractor was not "fair" with them, and did not pay the prevailing established wages. (In our case the union's business agent visited the construction site and talked with the general contractor's job superintendent complaining that BDJ was not "straight" with the union.) The Trades

Council President mentioned that there was a meeting of the Council scheduled for that evening and the subject was sure to come up. (The union representative in our case stated BDJ would have to get straight or there could be trouble. In both instances the clear implication was that the union would take some action.) The Council President then called the next day and said the men were angry and tried to give the general contractor a list of "fair" plumbers, but those companies' bids had been two or two and a half times higher than the nonunion plumber on the job. The general contractor's president went to a Council meeting in an attempt to explain his situation and pointed out he should have been informed that there were certain subcontractors with whom employees of other subcontractors would not work before he had accepted bids. Through discussion, the general contractor then ascertained that the picket would be removed if: (1) it were proven the plumbing subcontractor paid the prevailing wages or (2) the plumbing contractor was removed from the job and the balance of the work was given to a "fair" plumber. However, later in the meeting the general contractor claimed he was told the only solution was the latter alternative. Ultimately, the general contractor cancelled the non-union plumber's contract, and the picket was immediately removed. (Similarly, when Kealy Construction called the respondent's business office, they were informed that the picket would not be removed until the union received a letter or telegram stating that BDJ would not be allowed back on the job unless it used union laborers, and as soon as a telegram was received to that effect, the picket was removed.) It can make little difference here that Kealy voluntarily removed BDJ on the

first day of picketing prior to the telephone discussion with the union. Kealy voluntarily removed BDJ only for that one day. It soon became apparent to Kealy through discussions with union representatives, they could not let BDJ back on the job without incurring picketing. In addition, the union later threatened to picket if BDJ reappeared on the site even during times when other employees would not be present. Therefore, the only way Kealy could avoid picketing of its construction site was to remove BDJ from the job, and this was clearly the union's intent from the pressure it exerted directly upon Kealy. Granted this pressure was not quite as explicit as in *NLRB v. Plumbers Local 307, supra,* where the Trades Council offered to supply a list of "fair" plumbers (ostensibly for replacement) and specifically mentioned removing the non-union plumber and giving the balance of the job to a union plumber. However, the union's persistent complaints to Kealy about BDJ in this case cannot be ignored and have to be viewed as a request for Kealy to take some action against BDJ. As the *Plumbers* opinion states:

> [T]he picketing coupled with the direct appeals to the neutral employer constitute the kind of "restraint" which the statute was designed to prevent.

Id. at 409.

Turning to the Reserve Center picketing, the circumstances show that the union again went to the general contractor on a construction project with a threat to picket unless the project superintendent got things "straightened out" with a subcontractor using non-union labor. Again, the subcontractor refused to pay union scale, and

the only alternative Knudson had to keep from having the premises picketed was to cancel Kahler's contract. Furthermore, after the dispute over Kahler arose, Knudson then found themselves picketed by the trust. [As set forth in paragraphs 19 and 24 of the findings of fact, the trust can hardly be considered a separate entity here even though that is the union's position. Leonard Schaefer is both an agent of the union and of the trust. He specifically gave permission to a union representative to put a trust picket sign up against Knudson after learning of the union's difficulties with Kahler. It was a union agent who decided to put out trust picket signs. To find that both Schaefer and Otte's sole objective in placing the Knudson pickets was to collect the bond would be ignoring the realities of the situation and the union threat to picket because of Kahler. The facts of this case show that picketing of both Knudson and Kahler was done to put pressure on Knudson to cease doing business with Kahler.]

The Glad Tidings picketing again presents a question of the motives of both the union and union trustee picketing. Here the general contractor was non-union, and after separate gates were erected a union trustee picketed one of the subcontractors, Underwood Constructors. Leonard J. Schaefer admitted that he had not been out looking for Underwood prior to this time, and the thought of putting a picket out against Underwood did not enter his mind until the Lanco project was gated. He was hardly oblivious to the fact that the union had a dispute with Lanco. It is apparent that the union wanted to prolong the dispute at the Lanco site from the fact that:

1. The picketing of Underwood was confined to the Lanco site even though Underwood was not working there at the time and was working at other sites;

2. the picketing continued after Underwood agreed to sign a collective bargaining agreement and while they were waiting to receive a collective bargaining agreement to sign, and such collective bargaining agreement was never sent to them by the union;

3. once Underwood had signed a collective bargaining agreement the picket sign remained on the job for several days and then a new picket sign for a cash bond went up.

By stretching out the dispute at the Glad Tidings site as long as possible, the union hoped to put more pressure on the neutral subcontractors and coerce them to stop doing business with Lanco.

It is therefore recommended that the Eighth Circuit Court of Appeals find that:

A) The acts, conduct, and picketing at the Van Dorn Plaza were done with an illegal secondary objective in violation of this Court's decree of May 13, 1968 and its contempt adjudication of February 9, 1972;

B) the acts, conduct, and picketing at the Reserve Center and corresponding picketing at Lackawanna Leather were done with an illegal secondary objective in violation of this Court's decree

of May 13, 1968 and its contempt adjudication of February 9, 1972;

C) the acts, conduct and picketing at the Glad Tidings Church were done with an illegal secondary objective in violation of this Court's decree of May 13, 1968 and its contempt adjudication of February 9, 1972.

The order of contempt heretofore issued prescribes fines to be levied against respondent in event of disobedience, using this language: " . . . this Court will deal further with the matter by imposing a fine of $5,000 on the respondent, and an additional fine of $500 per day so long as such non-compliance of this order or of the decree continues." It is the contention of petitioner that each of the three sites of secondary picketing should carry a fine of $5,000 and there were 25 additional days of unlawful picketing or other unlawful acts of coercion which should add $12,500 to the fine, all as is itemized on page 20 (a) of petitioner's proposed findings of fact.

Whether it was in the contemplation of the Court if its order was violated that there would be several separate incidents such as your Master believes have been proven in this case, and that the $5,000 fine should be imposed for each, or whether the fine should be one $5,000 fine plus an additional daily basis fine for the additional days of unlawful secondary activity is for the Court of Appeals or a panel thereof to determine.

Your Special Master recommends either that respondent pay to the National Labor Relations Board, for deposit in the U. S. Treasury, a fine of $5,000 for each of

the three incidents in the total sum of $15,000, or in the alternative that a fine be imposed of $5,000 for unlawful secondary activity and in addition a fine of $500 per day for 28 days of unlawful secondary activity be imposed, making a total fine of $19,000. Your Special Master recommends the latter amount, and would suggest in any order of the Court of Appeals that it be made clear that if there is any further failure of respondent, its officers, agents, successors, and assigns, to obey this Court's order, that a fine of not less than $10,000 will be imposed on respondent in the future for each separate place where unlawful secondary activity occurs, together with an additional fine of not less than $1,000.00 for each additional day of unlawful activity at such location or locations. Such order should further provide that respondent:"

Fully comply with and obey the Board's order as enforced by this Court's decree of May 13, 1968, and fully comply with and obey the Court's Order on Contempt of February 9, 1972, and not in any way, by action or inaction, commit, engage in, induce, encourage, permit or condone any violation of the said decree and order.

Immediately post in conspicuous places in its business offices, meeting halls, and all places where notices to employees are customarily posted, for a period of sixty (60) days, copies of the Court's order and a notice in the form to be supplied by the Board, signed by an appropriate officer on behalf of the Union which states that the Union has been adjudged in civil contempt of the Court for violating and disobeying the Court's judgment of May 13, 1968 and for violating and disobeying the Court's judgment of February 9, 1972, and that it will

forthwith undertake the action ordered in purgation, such notices together with a copy of the contempt adjudication to be maintained in clearly legible condition throughout such posting period and insure that such notices are not altered, defaced or covered by any other material.

Sign and mail copies of said notice to the Regional Director for the Seventeenth Region, 616 - Two Gateway Center, Fourth at State, Kansas City, Kansas 66101, for posting by Kealy Construction Co., BDJ Construction Co., Knudson, Inc., Kahler Construction, Inc., Lanco Corp., L. A. Structural, Inc., and Underwood Constructors, Inc., at their respective offices, if such employers be willing.

Sign and mail copies of said notice and the adjudication to all employers in the construction industry with whom the Union has a signed participation agreement; and sign and mail copies of the notice and adjudication to all members of the Union; and furnish the Regional Director for the Seventeenth Region with a list of all employers and members to whom said notice and adjudication has been mailed, together with proof of mailing thereof.

Read aloud said notice, by an officer of the Union at the next regularly scheduled or specially called meeting of the membership, whichever is the sooner.

File separate sworn statements with the Clerk of the United States Court of Appeals for the Eighth Circuit, and a copy thereof with the Regional Director of the Seventeenth Region, in writing, within thirty (30) days after the entry of the Court's order and again upon termination of the posting period, showing what steps have

been taken by the Union to comply with the Court's decision.

Pay the costs of this proceeding without including counsel fees, upon submission by the Board of a verified bill of costs.

The order of the Court should also include a provision that upon failure of respondent to purge itself of civil contempt the Court use such other means as the Court shall determine just and proper, including the issuance of body attachment upon any officer or agent or respondent responsible for respondent's non-compliance with the decrees of this Court.

DATED: November 11, 1977.

/s/ Robert Van Pelt

Special Master

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19,297

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

CONSTRUCTION & GENERAL LABORERS' UNION LOCAL 1140, affiliated with International Laborers' Union of North America, AFL-CIO,
Respondent.

JUDGMENT ON CONTEMPT

Before VAN OOSTERHOUT, Senior Circuit Judge, HENLEY, Circuit Judge, and HANSON,* Senior District Judge

THIS CAUSE came on to be heard upon exceptions filed by the National Labor Relations Board ("the Board") and by Construction & General Laborers' Union Local 1140, affiliated with International Laborers' Union of North America, AFL-CIO ("the Union"), to the November 14, 1977 report of the Special Master. The Court heard argument of respective counsel on March 15, 1978, and has considered the briefs and transcript of record filed in this cause. On May 8, 1978, the Court being fully advised in the premises, handed down its decision.

ON CONSIDERATION WHEREOF, it is ordered and adjudged that the Master's findings of fact, conclu-

*The Honorable William C. Hanson, Senior District Judge, Southern District of Iowa, sitting by designation.

sions of law, and recommendations be and hereby are adopted in their entirety.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Construction and General Laborers Local 1140, AFL-CIO is in civil contempt of this Court and that said Union, through its officers and agents shall purge itself of said contempt by:

1. Forthwith paying to the National Labor Relations Board, for deposit in the United States Treasury, a fine of $19,000, which amount is hereby imposed for violations of this Court's prior contempt order of February 9, 1972.

2. Fully complying with and obeying the order of the National Labor Relations Board enforced by this Court's decree of May 13, 1968, and fully complying with and obeying this Court's order on Contempt of February 9, 1972.

3. Immediately posting in conspicuous places in its business offices, meeting halls, and all places where notices to employees are customarily posted, for a period of sixty (60) consecutive days, copies of the Court's order herein, and a notice in the form to be supplied by the Board, signed by an appropriate officer on behalf of the Union, which states that the Union has been adjudged in civil contempt for violating and disobeying the Court's judgment of May 13, 1968 and for violating and disobeying the Court's judgment of February 9, 1972, and that it will forthwith undertake the action ordered in purgation, such notices together with a copy of the contempt adjudication to be maintained in clearly legible condition throughout such posting period, and insure that such notices are not altered, defaced or covered by any other material.

4. Signing and mailing copies of said notice to the Regional Director for the Seventeenth Region of the Board, for posting by Kealy Construction Company; BDJ Construction Company; Knudson, Inc.; Kahler Construction, Inc.; Lanco Corporation; L. A. Structural, Inc.; and Underwood Constructors, Inc., at their respective offices, if such employers be willing.

5. Signing and mailing copies of said notice and the adjudication to all employers in the construction industry with whom the Union has signed a participation agreement; and furnishing the Regional Director for the Seventeenth Region with a list of all employers to whom said notice and adjudication has been mailed, together with proof of mailing thereof.

6. Reading aloud said notice, by an officer of the Union at the next regularly scheduled or specially called meeting of the membership, whichever is the sooner.

7. Filing separate sworn statements in writing with the Clerk of the United States Court of Appeals for the Eighth Circuit, and a copy thereof with the Regional Director of the Seventeenth Region of the Board within thirty (30) days after the entry of this Court's order and again upon termination of the posting period, showing what steps have been taken by the Union to comply with this Court's decision.

8. Paying the Board all costs and expenses incurred in the preparation for and final disposition of this proceeding, exclusive of attorney's salaries or the expenses of investigation, upon submission by the Board of a verified bill of costs.

In the event of the failure of respondent, its officers and agents to purge itself of contempt as herein provided, this Court will deal further with the matter by considering the imposition of a compliance fine of $10,000 for each separate place where unlawful secondary activity occurs, together with an additional fine of $1,000 for each additional day on which such unlawful activity continues at each location or locations, and by such other means as the Court may direct, including the issuance of body attachment upon any officer or agent responsible for such noncompliance.

DATED:

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19,297

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

CONSTRUCTION & GENERAL LABORERS' UNION LOCAL 1140, affiliated with International Laborers' Union of North America, AFI-CIO,

Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that one copy of the Board's Proposed Judgment in the above captioned matter has this day been served by first class mail upon the following counsel at the address listed below:

DAVID D. WEINBERG
WEINBERG & WEINBERG
300 Keeline Building
Omaha, Nebraska 68102

/s/ PAUL ELKIND,
Assistant General Counsel
for Contempt Litigation

Dated at Washington, D.C.
this 29th day of June, 1978.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19297

September Term, 1977

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

CONSTRUCTION & GENERAL LABORERS UNION LOCAL No. 1140, AFL-CIO,

Respondent.

PETITION FOR ENFORCEMENT OF ORDER OF NATIONAL LABOR RELATIONS BOARD

The Court having considered petition for rehearing en banc filed by counsel for respondent and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

June 14, 1978

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-224

CONSTRUCTION AND GENERAL LABORERS' UNION, ETC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 11, 1978.

/s/ HARRY A. BLACKMUN
Associate Justice of the Supreme Court of the United States

Dated this 31st day of August, 1978.